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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

STEVE BERRO, Plaintiff and Appellant, v. COUNTY OF LOS ANGELES et al., Defendants and Respondents.	B223515 (Los Angeles County Super. Ct. No. BC376216)
STEVE BERRO, Plaintiff and Respondent, v. COUNTY OF LOS ANGELES et al., Defendants and Appellants.	B228916 (Los Angeles County Super. Ct. No. BC376216)

APPEAL from a judgment of the Superior Court of Los Angeles County, Soussan G. Bruguera, Judge. Affirmed.

Haney Torbett and Steven H. Haney; Steve Berro, in pro. per.; Michael Leight for Plaintiff and Appellant in case No. B223515 and Plaintiff and Respondent in case No. B228916.

McCune & Harber, Christy L. O'Donnell and Heather M. Bean for Defendants and Respondents in case No. B223515 and Defendants and Appellants in case No. B228916.

INTRODUCTION

Plaintiff Steve Berro (Berro), a captain with the County of Los Angeles Fire Department (LACOFD), appeals from the grant of summary judgment on his complaint for employment discrimination and related claims against defendants County of Los Angeles, LACOFD, and individual LACOFD officers Angel Montoya, Ed Gandara, and Daryl Osby (collectively referred to as LACOFD). In turn, LACOFD appeals from the trial court's order denying its motions for attorney fees, expert witness fees, and sanctions, and partially granting Berro's motion to strike costs. We consolidated the two appeals, and now affirm the judgment in its entirety.

Berro alleged four claims under the California Fair Employment and Housing Act (FEHA, Gov. Code,[1] § 12940, et seq.): employment discrimination (disparate treatment based on race), retaliation, harassment, and negligent investigation. He also alleged claims for whistleblower retaliation under section 53298, as well as Labor Code section 1102.5 and Los Angeles County Code section 5.02.060, and for intentional infliction of emotional distress.

As we explain in more detail below, although the trial court erred in adjudicating Berro's FEHA discrimination claim on the ground that Berro failed to show that he belonged to a protected group, we nonetheless affirm the adjudication

[1] All references to code sections are to the Government Code unless specified otherwise.

of that claim, because only four of the purportedly adverse employment actions relied on by Berro actually qualify as such, and as to those four actions, LACOFD produced evidence of legitimate, nondiscriminatory reasons which Berro failed to rebut. Concerning Berro's remaining claims, we hold as follows: (1) the FEHA retaliation claim fails because Berro did not show that he engaged in protected activity; (2) the FEHA harassment claim fails because Berro did not show harassing conduct or a racially discriminatory motive; (3) the FEHA negligent investigation claim cannot stand without the FEHA retaliation and harassment claims; (4) the whistleblower retaliation claims fail because Berro did not show that he engaged in protected activity under Labor Code section 1102.5 and Los Angeles County Code section 5.02.060 (and in any event no private right of action exists under the latter section), and because he failed to comply with the requirements of a claim under section 53298; and (5) Berro's claim for intentional infliction of emotional distress claim, which is unsupported by prohibited discriminatory or harassing conduct by LACOFD, is barred by the worker's compensation exclusivity rule.

As for the appeal by LACOFD, we find no abuse of discretion in the trial court's order denying LACOFD's request for fees and sanctions and taxing its costs.

FACTUAL AND PROCEDURAL BACKGROUND

I. *Operative Complaint*

The operative complaint is Berro's fifth amended complaint, alleging claims for: (1) retaliation for protected activity (§ 12940, subd. (h)); (2) negligent investigation (§ 12940, subds. (j)(1), (k)); (3) hostile work environment (§ 12940, subd. (j)(1)); (4) disparate treatment and discrimination based on being Caucasian or Caucasian-appearing (§ 12940, subd. (a)); (5) whistleblower retaliation (L.A.

County Code, § 5.02.060; Lab. Code, § 1102.5; § 53298); and (6) intentional infliction of emotional distress.[2] Berro alleged the following facts.

Berro, a Caucasian man, began working as a firefighter in 1986 and began his career with LACOFD in 1991. During the course of his career, he established a reputation as an excellent and dedicated firefighter. He now holds the rank of captain with LACOFD.

Beginning in 2005, two Hispanic officers, Assistant Fire Chief Angel Montoya and Battalion Chief Gandara, made the decision to transfer another firefighter, Scott Holland, from his position as a firefighter to a paramedic position for purposes of a mandatory training. Berro believed the decision to transfer Holland was based on Holland's race (Caucasian), and protested the transfer (the "Holland incident"). Montoya and Gandara, apparently angry that Berro

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[2] The case has a tortured procedural history. Berro filed his original complaint on August 17, 2007. Successive amended complaints followed in the wake successful demurrers by LACOFD. The operative, fifth amended complaint was filed on January 15, 2009. Meanwhile, on January 7, 2009, before leave was granted to file the fifth amended complaint, LACOFD filed a motion for summary judgment with respect to then-extant causes of action in the fourth amended complaint (retaliation, negligent investigation, hostile work environment, whistleblower retaliation, and intentional infliction of emotional distress). Following the filing of the fifth amended complaint, which added a claim for discrimination (disparate treatment on the basis of race), LACOFD filed a motion for summary adjudication of that claim on April 14, 2009.

Characterizing the procedural history as one of "irregular" behavior by the trial court and counsel for LACOFD, including the trial court's decision to permit LACOFD to file its summary judgment motion after the motion cutoff date, Berro argues that this court should reverse the judgment on this ground alone. However, he fails to cite any relevant authority, and therefore the claim is forfeited. (*In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 830 ["The absence of cogent legal argument or citation to authority allows this court to treat the contentions as waived."]; *Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785 ["When an appellant . . . asserts [a point] but fails to support it with reasoned argument and citations to authority, we treat the point as waived"]; Cal. Rules of Court, rule 8.204(a)(1)(B).)

questioned their decision, began targeting Berro for harassment, discrimination, and retaliation.

Following the Holland incident, Gandara disciplined Berro after Deputy Fire Chief Daryl Osby discovered Berro and other firefighters out of uniform during a surprise visit. At the time, Berro and the firefighters were attempting to complete the mandatory morning physical fitness workout that had been interrupted by an emergency medical technician (EMT) training scheduled for that morning. Although Berro was issued a "notice of instruction" for the late workout, another captain at the same fire station (Station 20) who also was caught out of uniform at the same time, Captain Coulter, initially was only given verbal counseling, and was issued a notice of instruction only after Berro pointed out the disparate treatment. Gandara later admitted to Berro that he issued him a notice of instruction in retaliation for Berro's questioning the Holland transfer. Montoya subsequently singled out Berro's team for daily inspections to ensure that the team adhered to the physical fitness time limits.

Gandara and Montoya also declined Berro's request for necessary medical and station supplies. In particular, Montoya denied his request for a second blue ham radio, asserting that Berro did not need the second radio and there were none available in any case. However, Berro and the union representative discovered that blue radios were in fact available, and Osby was forced to order Montoya to approve Berro's request.

After Berro drafted and submitted annual performance evaluations for his subordinate firefighters, virtually all of whom were Caucasian, Gandara and Montoya returned all the evaluations to Berro for the stated reason that he did not submit proper documentation to support the ratings he had assigned to his team. On the other hand, a Hispanic captain, Captain Gracia, who gave his subordinate firefighters virtually identical ratings with far less supporting documentation than

Berro provided, did not have his evaluations returned. Gandara gave Berro a direct verbal order to revise the evaluations, and almost immediately thereafter, gave him a direct written order to revise them. The written order was given to Berro at 8:50 p.m., but the stated deadline for complying with the order was 8:00 p.m. on February 16, 2006, rendering it impossible for Berro to comply with the order. Gandara also confronted Berro in person and told him he could be terminated if he did not revise the evaluations. Gandara then gave Berro a request for a written statement regarding what Gandara termed Berro's "insubordination." Osby agreed to hold all potential discipline in abeyance until Berro's union representative, Don Lassig of Firefighters Local 1014, could be present, but Osby later reneged on the agreement by permitting Montoya to issue Berro a letter of reprimand for his refusal to revise the evaluations. Berro realized that if he did not downgrade his subordinates' ratings, he likely would face even more severe discipline. After he assigned lower ratings, his subordinates submitted a grievance against him.

Gandara also refused to submit Berro's resume for consideration for a recruit training position, effectively delaying Berro's submission for two months. In addition, when two firefighters on Berro's team got into a heated argument, a situation which Berro resolved informally, Gandara insisted on written memoranda regarding the incident, including one from Berro, allegedly after receiving an anonymous phone call about the incident.

Berro requested a transfer to another station to extricate himself from the hostile and discriminatory work environment created by Montoya and Gandara. His request was granted, but one day before the transfer was scheduled to take place, it was "frozen." Only after a union representative met with Montoya was the freeze withdrawn and Berro permitted to transfer.

Berro submitted a grievance concerning the harassing and retaliatory conduct of Gandara, and Osby took 47 days, instead of the required 10 days, to respond to it.

As a result of the discrimination, harassment and retaliation to which he was subjected, Berro suffered mental anguish, emotional distress, and physical symptoms, including a change in appearance and temperament.

II. *LACOFD's Summary Judgment Motion*[3]

LACOFD challenged Berro's cause of action for racial discrimination on the grounds that Berro had not proffered evidence that he was perceived as being Caucasian and thus was not a member of a protected class; he had not suffered an adverse employment action; legitimate, nondiscriminatory reasons justified every action LACOFD took; and the worker's compensation law provided the exclusive remedy for Berro's claim.

As to Berro's FEHA retaliation claim, LACOFD argued that Berro could not establish a prima facie case because there was no evidence of a causal connection between the purported adverse actions and the alleged protected activity of protesting Holland's transfer, and no evidence that Berro put his employer on notice that he believed Holland's transfer resulted from racial animus against Caucasians. LACOFD further contended that even if Berro had made out a prima facie showing of retaliation, he could not overcome LACOFD's showing of legitimate reasons for its actions.

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[3] As discussed above (fn. 2, *ante*), LACOFD filed a summary judgment motion to the claims of the fourth amended complaint, followed by a motion for summary adjudication of the newly-added claim for discrimination in the fifth amended complaint. For ease of discussion, we treat the motions as a single motion for summary judgment.

With respect to the cause of action for hostile work environment, LACOFD argued that the conduct alleged by Berro in support of the claim consisted solely of conduct necessary for performance of a supervisory position that could not constitute harassment as a matter of law; further, the alleged conduct was not severe and pervasive, and Berro offered no evidence that it was motivated by discriminatory animus.

LACOFD argued that Berro's causes of action for negligent investigation and intentional infliction of emotional distress were derivative of Berro's claims for discrimination, retaliation and harassment, and necessarily fell along with those claims. LACOFD further contended that both claims were barred by the worker's compensation exclusivity doctrine, and that the negligent investigation claim lacked a statutory basis imposing a mandatory duty on LACOFD.

LACOFD further contended that Berro's cause of action for whistleblower retaliation, founded on a trio of state and local provisions -- Labor Code section 1102.5, section 53298, and Los Angeles County Code section 5.02.060 -- failed because there is no private right of action under those provisions. In addition, LACOFD argued that Berro had not reported a violation of a state or federal statute or regulation, a necessary element under Labor Code section 1102.5, and Berro failed to allege and support with evidence particular requirements for claims brought under section 53298, including that he filed an administrative complaint within 60 days of the alleged misconduct and filed it under penalty of perjury.

III. *Berro's Opposition to Summary Judgment Motions*

In opposition, Berro relied on evidence that he was perceived as being Caucasian, and as such, was a member of a protected class subject to the protection of FEHA's anti-discrimination provisions. As discussed in further detail below, he submitted his own declaration, declarations from fellow firefighters and from

union representative Lassig, purporting to demonstrate numerous ways in which he was treated differently from his fellow employees, harassed, retaliated against, and subjected to adverse employment actions. He also relied on deposition testimony from fellow firefighters, Lassig and as well as the individual officer defendants. He proffered evidence purporting to show that he engaged in protected activity by protesting Holland's transfer, the denial of supplies, and the differential treatment with respect to performance evaluations Berro completed for his subordinates, which, he argued, proved that he sufficiently put his employer on notice that these actions were motivated by racial bias. He also offered evidence intended to cast doubt on the truthfulness of the explanations offered by LACOFD for the actions taken with respect to Berro.

With respect to his negligent investigation claim, Berro contended that LACOFD had a statutory duty based on section 12940, subdivisions (j)(1) and (k) to take reasonable steps to prevent discrimination and harassment against him. He argued that there was a private right of action under Labor Code section 1102.5, Los Angeles County Code section 5.02.060 and section 53298, and further contended that his allegations that LACOFD violated FEHA's anti-discrimination provisions constituted a sufficient allegation of a violation of state law and that he had proffered evidence satisfying the elements of section 53298. With respect to his cause of action for intentional infliction of emotional distress, Berro contended that LACOFD's discriminatory, retaliatory and harassing conduct fell outside the scope of a normal employment relationship, and thus the worker's compensation exclusivity doctrine did not bar his claim.

IV. *The Trial Court's Ruling*

The trial court granted summary judgment in favor of LACOFD on all claims. The court found that Berro's fourth cause of action for disparate treatment

based on race failed because Berro could not show he was a member of a protected class. As to the first cause of action for retaliation in violation of FEHA, the court found that Berro had not proffered evidence that he was engaged in activities protected by FEHA when he questioned the propriety of Holland's transfer. As to Berro's third cause of action for hostile work environment, the court found that the alleged harassment did not consist of conduct outside the scope of necessary job performance, as required to support such a claim. The court concluded that the second cause of action for negligent investigation failed because it was based on LACOFD's alleged violation of its internal rules and regulations that did not create a mandatory duty. With respect to the fifth cause of action for whistleblower retaliation, the court found that there was no private right of action under Los Angeles County Code section 5.02.060, and that Berro's claim under Labor Code section 1102.5 failed because he did not demonstrate a violation of a state or federal rule or regulation, but the court did not explicitly address Berro's claim under section 53298. The court found that the sixth cause of action for intentional infliction of emotional distress was barred by the worker's compensation exclusivity rule.

Following entry of judgment, LACOFD moved pursuant to section 12965 for an award of attorney fees in the amount of $418,372.33 and an award of expert witness fees in the amount of $26,862.50. LACOFD also moved under Code of Civil Procedure section 1038 for an award of defense costs totaling $209,186.17. The trial court denied the motions. LACOFD also submitted a memorandum of costs in the amount of $68,732.54, but the court granted in part Berro's motion to tax costs, and awarded LACOFD a total of $31,882.36.

Berro timely appealed from the judgment and LACOFD from the superseding judgment that included the denial of its motions for attorney and expert witness fees and for defense costs pursuant to Code of Civil Procedure

section 1038, as well as the partial grant of Berro's motion to tax costs. We consolidated the two appeals.

Before the appeal was fully briefed, Berro filed for bankruptcy protection and an automatic stay was put in place. Six months later this court was notified that Berro's bankruptcy was discharged, and following several extension requests by Berro, briefing was completed.

DISCUSSION[4]

I. *Racial Discrimination (Disparate Treatment) Claim*

We begin with the adjudication of Berro's fourth cause of action for race-based disparate treatment in violation of FEHA. As we explain, the trial court erred in adjudicating this claim on the ground that Berro failed to show that he belonged to a protected group. However, we affirm the ruling on different grounds: only four of the purportedly adverse employment actions relied on by Berro actually qualify as such, and as to those four actions, LACOFD produced evidence of legitimate, nondiscriminatory reasons which Berro failed to rebut.

Section 12940, subdivision (a) prohibits employers from discriminating against an employee on the basis of race, color or national origin, among other protected categories, "in compensation or in [the] terms, conditions, or privileges of employment." (§ 12940, subd. (a).) Race, color, or national origin "*includes a perception* that the person has any of those characteristics." (§ 12926, subd. (o), italics added.) To make out a prima facie case of discrimination, "[g]enerally, the

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[4] The trial court overruled in toto the parties' voluminous objections to the evidence submitted. Because neither party challenges the ruling, we consider all the evidence in the papers, except the evidence submitted by LACOFD along with its reply brief, which was ordered stricken. (See Code Civ. Proc., § 437c, subd. (c); *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 534.)

plaintiff must provide evidence that (1) he was a member of a protected class, (2) he was qualified for the position he sought or was performing competently in the position he held, (3) he suffered an adverse employment action, such as termination, demotion, or denial of an available job, and (4) some other circumstance suggests discriminatory motive." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 355 (*Guz*).)

We review the grant of summary judgment de novo. (*Bourgi v. West Covina Motors, Inc.* (2008) 166 Cal.App.4th 1649, 1662.) To prevail on a motion for summary judgment in an action brought under the FEHA, a defendant employer initially has the burden to show either that the plaintiff could not establish one of the elements of the FEHA claim, or there was a legitimate, nondiscriminatory reason for the adverse employment action. (*Avila v. Continental Airlines, Inc.* (2008) 165 Cal.App.4th 1237, 1247 (*Avila*); *Hicks v. KNTV Television, Inc.* (2008) 160 Cal.App.4th 994, 1003 (*Hicks*).) If the employer meets this burden, the employer is entitled to summary judgment unless the plaintiff produces admissible evidence that raises a triable issue of fact material to the employer's showing. (*Guz, supra,* 24 Cal.4th at p. 357; *Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1005.)

In determining whether these burdens have been met, we view the evidence in the light most favorable to the nonmoving party, liberally construing his evidence while strictly scrutinizing the moving party's evidence. (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 460.) We will affirm a summary judgment if it is correct on any ground that the parties had an adequate opportunity to address in the trial court. (*California School of Culinary Arts v. Lujan* (2003) 112 Cal.App.4th 16, 22.)

A. *Protected Class Member*

In his operative complaint, Berro alleged that he is "Caucasian or Caucasian-appearing,"[5] and thus is a member of a protected class.[6] The trial court adjudicated this claim against Berro on the ground that he failed to produce any evidence to show that the individual defendants perceived him to be Caucasian. The court cited Berro's admissions that he did not know whether Gandara, Montoya, or Osby believed he was Hispanic or Caucasian, and that none of them ever made any remarks to him about his being Caucasian, Hispanic, or any other nationality. The court relied on decisions holding that an employer may not be held liable under FEHA for conditions which are unknown to it. (See, e.g., *Avila*, *supra,* 165 Cal.App.4th at p. 1247 ["'An adverse employment decision cannot be made "because of" a disability, when the disability is not known to the employer.'"]; *Faust v. California Portland Cement Co.* (2007) 150 Cal.App.4th 864, 886-887

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[5] LACOFD contends that Berro alleged that he was a "Caucasian-appearing Hispanic." However, the portion of the record to which LACOFD cites does not support its assertion.

[6] As noted in *Hicks,* some federal courts have imposed an increased burden on a Caucasian plaintiff alleging racial discrimination under title VII of the federal Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.), "requiring a showing of '"additional background circumstances"' to support the suspicion of discriminatory intent." (*Hicks, supra,* 160 Cal.App.4th at p. 1002, fn. 3, citing *Mastro v. Potomac Elec. Power Co.* (D.C. Cir. 2006) 447 F.3d 843, 851; *Murray v. Thistledown Racing Club, Inc.* (6th Cir. 1985) 770 F.2d 63, 67; *Mills v. Health Care Serv. Corp.* (7th Cir. 1999) 171 F.3d 450, 456–457; *Duffy v. Wolle* (8th Cir. 1997) 123 F.3d 1026, 1036–1037; *Reynolds v. School Dist. No. 1, Denver, Colo.* (10th Cir. 1995) 69 F.3d 1523, 1534; but see *Iadimarco v. Runyon* (3d Cir. 1999) 190 F.3d 151, 160–161 [rejecting the background circumstances requirement].) "In interpreting California's FEHA, California courts often look for guidance to decisions construing federal antidiscrimination laws, including title VII." (*Chavez v. City of Los Angeles* (2010) 47 Cal.4th 970, 984 (*Chavez*).) However, no California court has required a Caucasian plaintiff to make such a heightened showing in order to establish a claim under FEHA for reverse racial discrimination, and we decline to impose such an requirement here.

[discrimination claim based on disability]; *Knight v. Hayward Unified School Dist.* (2005) 132 Cal.App.4th 121, 124 [same]; *Trop v. Sony Pictures Entertainment, Inc.* (2005) 129 Cal.App.4th 1133 [finding that an employee cannot make out a prima facie case of pregnancy discrimination under FEHA in the absence of evidence the employer knew the employee was pregnant or the pregnancy was apparent].)

However, these decisions involved alleged discrimination based on a disability that was not apparent. Here, the basis of the alleged discrimination is race or ethnicity, and Berro produced evidence tending to show that others perceived him, based on his objective appearance, to be Caucasian. That is enough to raise a triable issue as to race.

It is true that Berro's own characterization of his racial and ethnic background was somewhat inconsistent. On his application for a firefighter position with the County of Los Angeles, he stated that he is Hispanic. At his deposition on July 9, 2008, he testified that he considers himself Hispanic. Later, in a declaration submitted in opposition to LACOFD's motion for summary judgment, he stated that he identified himself as both Caucasian and Hispanic. He explained that he considered himself to have a Caucasian bloodline and that his appearance is Caucasian, but he was adopted soon after birth and raised by a Hispanic couple, who instructed him that he could list himself as Hispanic "for educational and employment purposes."

Despite the inconsistencies in this evidence, the manner in which Berro characterizes his racial and ethnic background is not dispositive for determining whether the action taken was race-based. Under FEHA, the *perception by others* that the person is of a particular race is sufficient to show that person is a member of a protected class. (§ 12926, subd. (o); see *Bennun v. Rutgers State University* (3d Cir. 1991) 941 F.2d 154, 173 ["unlawful discrimination must be based on

[plaintiff's] objective appearance to others, not his subjective feeling about his own ethnicity"].) Thus, the dispositive issue here is whether other persons perceived Berro to be Caucasian, such that a triable issue exists whether his Hispanic superiors, who allegedly discriminated against him, might also have held that perception.

Berro produced evidence that, based on his appearance, he is perceived to be Caucasian. A fellow Station 20 firefighter, Leo Harris, testified at his deposition that he assumed Berro was Caucasian based on his appearance. Similarly, Lassig stated in his declaration in opposition to summary judgment that Berro appears Caucasian. From this evidence it may be inferred that the individual defendants, along with other members of Station 20, perceived him to be Caucasian and therefore a member of a protected class who could have been discriminated against on the basis of race. It follows that the court erred in adjudicating Berro's discrimination claim on the ground that he failed to show that he belongs to a protected class. Because our review is de novo, we now consider LACOFD's alternative arguments challenging the discrimination claim: that Berro suffered no adverse employment action, and that legitimate, nondiscriminatory reasons justify the actions taken.[7]

B. *Adverse Employment Actions*

As we explain, of the nine purportedly adverse employment actions properly considered on appeal, five do not qualify. However, four do.

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[7] Although the trial court granted summary adjudication on a different ground, supplemental briefing is not required under Code of Civil Procedure section 437c, subdivision (m)(2) because the ground on which we rely was raised below and has already been briefed on appeal. (*Byars v. SCME Mortgage Bankers, Inc.* (2003) 109 Cal.App.4th 1134, 1147, fn. 7 (*Byars*).)

"[T]o be actionable, an employer's adverse conduct must materially affect the terms and conditions of employment." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1051, fn. 9 (*Yanowitz*).) "[T]he determination of whether a particular action or course of conduct rises to the level of actionable conduct should take into account the unique circumstances of the affected employee as well as the workplace context of the claim." (*Id.* at p. 1052.) "[T]he phrase 'terms, conditions, or privileges' of employment must be interpreted liberally and with a reasonable appreciation of the realities of the workplace in order to afford employees the appropriate and generous protection against employment discrimination that the FEHA was intended to provide." (*Id.* at p. 1054.) The protections against discrimination in the workplace therefore are "not limited to adverse employment actions that impose an economic detriment or inflict a tangible psychological injury upon an employee." (*Id.* at p. 1052.) Rather, FEHA "protects an employee against unlawful discrimination with respect [to] the entire spectrum of employment actions that are reasonably likely to adversely and materially affect an employee's job performance or opportunity for advancement in his or her career." (*Id.* at pp. 1053-1054.) "[T]here is no requirement that an employer's retaliatory acts constitute one swift blow, rather than a series of subtle, yet damaging, injuries." (*Id.* at p. 1055.) Thus, "it is appropriate to consider plaintiff's allegations collectively under a totality-of-the circumstances approach." (*Id.* at p. 1052, fn. 11.)

In *Yanowitz*, the court found that the plaintiff had suffered adverse employment activity where "[m]onths of unwarranted and public criticism of a previously honored employee, an implied threat of termination, contacts with subordinates that only could have the effect of undermining [the] manager's effectiveness, and new regulation of the manner in which the manager oversaw her territory did more than inconvenience [the plaintiff]. Such actions, which for

purposes of this discussion we must assume were unjustified and were meant to punish [the plaintiff] . . . , placed her career in jeopardy. Indeed, [the manager] so much as told [her] that unless there were immediate changes, her career . . . was over. Actions that threaten to derail an employee's career are objectively adverse." (*Yanowitz, supra*, 36 Cal.4th at p. 1060.)

On appeal, Berro argues that LACOFD took the following adverse employment actions against him: (1) issuing him a "notice of instruction" for permitting his team to exercise outside the prescribed physical exercise period; (2) issuing him a letter of reprimand for failing to submit appropriate documentation for his team's performance evaluations and then refusing to comply with an order to do so; (3) purposefully delaying the submission of his application for the prestigious position of recruit trainer; (4) temporarily freezing his requested transfer to another fire station the night before the transfer was to take effect; (5) transferring Holland, a member of his crew, to another paramedic team against Holland's wishes and LACOFD policy; (6) denying his request for medical and station supplies; (7) imposing excessive discipline on his crew members for a matter that typically would have been handled informally; (8) temporarily demoting him to a fire prevention desk job where he earned less because he had no opportunity to work overtime; (9) targeting him with a temporary restraining order (TRO) and request for injunction; and (10) issuing him a second letter of reprimand, this time for personal use of a department computer and email to solicit support from his fellow employees for his "efforts to eradicate disparate treatment and fraud" by LACOFD.

We note that the last three of the cited adverse actions – transferring Berro to a fire prevention desk job, pursuing a TRO and injunction against him, and issuing him a second letter of reprimand -- were not pleaded in Berro's operative complaint. Of course, it is the complaint which defines the scope of issues to be

addressed at summary judgment. (*Hutton v. Fidelity National Title Co.* (2013) 213 Cal.App.4th 486, 499 (*Hutton*) [because "the pleadings set the boundaries of the issues to be resolved[,]" the defendant was not required "to refute liability on some theoretical possibilities not included in the pleadings"]; *Government Employees Ins. Co. v. Superior Court* (2000) 79 Cal.App.4th 95, 98, fn. 4; *Wattenbarger v. Cincinnati Reds, Inc.* (1994) 28 Cal.App.4th 746, 750.) However, in its motion for summary judgment, LACOFD extensively addressed two of these alleged adverse actions -- LACOFD transferring Berro to a desk job and seeking a TRO and injunction against him. Because these two purportedly adverse actions were addressed in the summary judgment motion even though not pleaded in the operative complaint, we consider them on appeal. However, we will not consider the remaining unpleaded action – the second letter of reprimand for improper use of a work computer. It was not addressed by LACOFD in its summary judgment motion, and Berro never properly sought leave to amend his complaint to include it.[8] Thus, the issue is forfeited on appeal. (*Distefano v. Forester* (2001) 85 Cal.App.4th 1249, 1264-1265; *Bostrom v. County of San Bernardino* (1995) 35 Cal.App.4th 1654, 1664.)

With respect to the nine remaining actions, LACOFD contends that none constitutes an adverse employment action because none affects the terms and conditions of Berro's employment. As we explain, we agree as to five: the delay in submission of Berro's recruit trainer application, the temporary freeze of his requested transfer to another station, the denial of his request for supplies, the

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[8] At the hearing on the summary judgment motion, Berro's counsel acknowledged that the operative complaint did not reference some of the later-occurring conduct by LACOFD, and suggested that Berro should be given the opportunity to supplement his complaint to include it. The court noted that in order to move to amend the complaint, Berro needed to identify the amendments with specificity and provide the court with a copy of the proposed amendment. Berro never did so.

detail of Holland to another team, and the alleged overly harsh discipline of Berro's team members. We disagree as to four: the notice of instruction, the letter of reprimand, the temporary demotion to a limited-duty fire prevention desk job, and the petition for a TRO and injunction.

1. *Non-Qualifying Employment Actions*

Berro contends that Gandara delayed by two months the submission of Berro's application for the prestigious position of recruit trainer, and that this action constituted an adverse employment action. But he proffered no evidence that he was denied the position, that the two-month delay hindered his opportunity to be appointed, or that the delay materially affected the terms and conditions of his employment in any way. (*Yanowitz, supra,* 36 Cal.4th at p. 1051, fn. 9.) Thus, he failed to raise a triable issue whether the delay in the application constituted an adverse employment action.

Similarly, the temporary freezing of Berro's requested transfer to another fire station the night before the transfer was to take effect does not qualify as an adverse employment action: there is no evidence that it resulted in any reduction in salary or benefits or materially affected Berro's job duties or opportunity for advancement. (See *Brown v. Brody* (D.C. Cir. 1999) 199 F.3d 446, 457 "[A] plaintiff who is . . . denied a lateral transfer -- that is, one in which she suffers no diminution in pay or benefits -- does not suffer an actionable injury unless there are some other materially adverse consequences . . . such that a reasonable trier of fact could conclude that the plaintiff has suffered objectively tangible harm."].) Further, the freeze was only temporary. (See *Yates v. Avco Corp.* (6th Cir. 1987)

819 F.2d 630, 638 [no adverse employment decision where temporary transfer did not result in loss of salary or benefits].)

As for the denial of Berro's request for supplies for the station, such as an extra radio and new kitchen chairs, there is no evidence that this action was reasonably likely to adversely and materially affect Berro's job performance, opportunity for advancement, or the terms and conditions of his employment. (*Yanowitz, supra*, 36 Cal.4th at pp. 1053-1054.) To the contrary, the evidence suggests that the denial of these requests falls under the category of "[m]inor or relatively trivial adverse actions or conduct by employers or fellow employees that, from an objective perspective, are reasonably likely to do no more than anger or upset an employee [that] cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment and are not actionable." (*Id.* at p. 1054.) "'"[W]orkplaces are rarely idyllic retreats, and the mere fact that an employee is displeased by an employer's act or omission does not elevate that act or omission to the level of a materially adverse employment action." [Citation.] If every minor change in working conditions or trivial action were a materially adverse action then any "action that an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit." [Citation.]' [Citation.] The plaintiff must show the employer's retaliatory actions had a detrimental and substantial effect on the plaintiff's employment." (*McRae v. Department of Corrections & Rehabilitation* (2006) 142 Cal.App.4th 377, 386 (*McRae*).)

Berro's reliance on the transfer of Holland to another assignment against his and Berro's wishes, and the overly harsh discipline imposed on Berro's team members, is misplaced. Those actions were not taken against Berro, and did not materially alter the terms and conditions of *his* employment.

Even considering these five actions in combination with each other and with the four actions discussed below (those we find qualifying), the record is devoid of

evidence from which a reasonable trier of fact could conclude that the five actions were "reasonably likely to adversely and materially affect [Berro's] job performance or opportunity for advancement in his or her career." (*Yanowitz, supra*, 36 Cal.4th at p. 1054.) Thus, none of these five actions can be considered an adverse employment action.

2. *Qualifying Employment Actions*

We now turn to the four actions as to which a triable issue exists whether they qualify as adverse employment actions.

a. *Notice of Instruction*

The first such alleged adverse action is a memorandum characterized as a notice of instruction that LACOFD issued to Berro for improperly allowing his crew to finish their mandatory daily fitness after the prescribed workout period from 8:15 a.m. to 9:30 a.m. Depending on the circumstances, and when considered in combination with other actions taken by the employer, instructional notices can be deemed to constitute adverse employment action. (See *Yanowitz, supra*, 36 Cal.4th at p. 1060 [critical memoranda, in conjunction with other actions by employer, deemed adverse action]; *Akers v. County of San Diego* (2002) 95 Cal.App.4th 1441, 1457 [counseling memorandum may be part of an adverse action in conjunction with other conduct materially affecting terms and conditions of employment]; but see *Pinero v. Specialty Restaurants Corp.* (2005) 130 Cal.App.4th 635, 646 ["nitpicking" and criticisms of employee did not constitute adverse action where plaintiff's "job responsibilities and title did not change, he was not demoted, and his salary, bonus structure, benefits and all other forms of compensation suffered no impact"].)

LACOFD proffered deposition testimony from Carla Williams, LACOFD's Chief of Human Resources and its designated person most knowledgeable on its human resources and personnel issues, stating that a notice of instruction "is a document that is given to an employee when they are not following procedures appropriately or they need some additional training or something has happened and their manager or chief or whomever it is . . . who needs to clarify how something should be done, they give them a notice of instruction." According to Williams, the Human Resources department does not acquire copies of notices of instruction when they are issued, and such notices are not retained in a firefighter's personnel file at Human Resources. LACOFD further asserts that a notice of instruction is not considered a form of discipline, relying on deposition testimony from Chief of Employee Relations Roxanne Benavides-Ortega to the effect that there is no such thing as informal discipline within the fire department, and that formal discipline includes only letters of warning and reprimand, suspension, reduction, and discharge.

In opposition, Berro proffered evidence disputing LACOFD's claim that the notice of instruction was not a disciplinary document, and that it did not remain in his file. For instance, Gandara testified that he considered the notice of instruction that he gave to Berro to be a form of informal discipline. In his declaration, Lassig stated that a notice of instruction "is a form of formal discipline within the department that is placed in the employee's department personnel file." Moreover, at his deposition, Lassig asserted that in his experience as an LACOFD captain for 28 years and a union officer for 10 years, LACOFD keeps notices of instruction in an employee's personnel file indefinitely, and whenever there is subsequent discipline of an employee, an earlier notice of instruction is always referenced. David Morse, a director of Firefighters Local 1014, also testified that issuing a notice of instruction is a form of discipline. Similarly, John Rees Price, who had

been a firefighter with the LACOFD for 36 years and served as the lead advocate for Firefighters Local 1014 for 12 years, testified that a notice of instruction is a disciplinary record, because it is the first step in the paper trail that can lead to more severe discipline such as a letter of reprimand. He testified that a notice of instruction remains in a firefighter's file and impedes a firefighter's opportunity to be promoted. Berro also proffered deposition testimony from Benavides-Ortega that if a notice of instruction for an employee came to the attention of the employee relations department, that department would keep the notice of instruction in the employee's file maintained by that department.

Thus, disputed factual issues remain as to whether the notice of instruction remained in Berro's file, whether it constituted a form of discipline, and whether it was likely to impede his opportunities for promotion within the department. Further, we must consider the notice of instruction along with the other conduct claimed to constitute adverse employment action. (*Yanowitz, supra,* 36 Cal.4th at p. 1055.)

b. *Letter of Reprimand*

LACOFD concedes that Berro received a letter of reprimand for failing to provide documentation to support his 2005 performance evaluations for the firefighters on his team and failing to obey an order to do so. There also is no dispute that the letter of reprimand constitutes a disciplinary document that remained in his file. Nonetheless, LACOFD argues, without any citation to evidence, that the letter of reprimand did not materially and adversely affect the terms and conditions of Berro's employment. The record is to the contrary.

In his declaration, Lassig stated that in his professional opinion and experience, Berro will never be considered for a promotion within the department due to the letter of reprimand in his file. Thus, especially when considered

collectively with other actions, a triable issue exists whether the letter of reprimand constitutes adverse action against Berro.

c. *Temporary Transfer to Desk Job*

Berro contends that he experienced a temporary demotion to a limited-duty fire prevention desk job, ostensibly to accommodate his medical restrictions. Although a plaintiff who is made to undertake a lateral transfer in which he or she suffers no reduction in pay or benefits generally is not considered to have suffered an actionable injury (*McRae, supra*, 142 Cal.App.4th at p. 393), in this case Berro produced evidence that he *did* suffer a loss of pay: a loss of overtime earnings estimated at $10,000 to $15,000 in total. (*Fonseca v. Sysco Food Services of Arizona, Inc.* (9th Cir. 2004) 374 F.3d 840, 847-848 [denial of opportunity to earn overtime pay can be an adverse employment action].) Further, a change in job duties may be deemed an adverse employment action, depending on the circumstances, and Berro alleges that he was given no work at this temporary position. (See *White v. Burlington Northern & Santa Fe R. Co.* (6th Cir. 2004) 364 F.3d 789, 797 ["A reassignment without salary or work hour changes . . . may be an adverse employment action if it constitutes a demotion evidenced by 'a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation.'"]; *Yartzoff v. Thomas* (9th Cir. 1987) 809 F.2d 1371, 1376 ["Transfers of job duties and undeserved performance ratings, if proven, would constitute 'adverse employment decisions' cognizable" under [Title VII].].) Thus, the temporary transfer to the fire prevention position could be considered an adverse employment action.

d. *Petition for TRO and Injunction Against Berro*

During a deposition, Berro revealed that in a private session with his therapist, he said that he was afraid he "may physically harm" Osby, Montoya, and Gandara and felt like he was "going to explode." Based on this revelation, on December 23, 2008, LACOFD obtained a TRO on behalf of those named chiefs pursuant to Code of Civil Procedure section 527.8, subdivision (a), and later unsuccessfully petitioned for a permanent injunction prohibiting violence or threats by Berro against them. LACOFD argues that Berro failed to proffer any evidence that LACOFD's obtaining a TRO and attempting to obtain an injunction adversely affected the terms and conditions of Berro's employment, or his chances for promotion. However, LACOFD overlooks Berro's declaration, in which he states that having to defend himself in the injunction proceeding was traumatic and caused him severe stress, anxiety, depression, and fear, among other effects, and that he was emotionally damaged afterwards. Actions by an employer that cause "tangible psychological injury" are likely to negatively affect job performance and may, together with other actions, constitute adverse employment actions. (*Yanowitz, supra*, 36 Cal.4th at p. 1052; see *Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 424 [acts that caused employee "substantial psychological harm" can be part of "a pattern of conduct, the totality of which constitutes an adverse employment action"].) Considered along with the other alleged conduct, a triable issue exists whether the TRO and injunction proceedings against Berro constituted an adverse employment action.

Having concluded that Berro raised a triable issue whether these four incidents constituted adverse employment actions, we now turn to whether there is

a triable issue concerning LACOFD's legitimate, nondiscriminatory reasons for these actions. (*Avila, supra,* 165 Cal.App.4th at p. 1247.) [9]

C. *Legitimate, Non-Discriminatory Reasons and Evidence of Pretext*

Once a plaintiff has made a prima facie showing of discrimination, the burden shifts to the employer to rebut the presumption of discrimination by producing admissible evidence suggesting that the employer's action was taken for a legitimate, nondiscriminatory reason. (*Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 68 (*Morgan*).) If the employer sustains this burden, to avoid summary judgment, the plaintiff must "'"offer substantial evidence that the employer's stated nondiscriminatory reason for the adverse action was untrue or pretextual, or evidence the employer acted with a discriminatory animus, or a combination of the two, such that a reasonable trier of fact could conclude the employer engaged in intentional discrimination."' [Citation.]" (*Id*. at p. 75.)

"'There will seldom be "eyewitness" testimony as to the employer's mental processes.' [Citation.] 'In discrimination cases, proof of the employer's reasons for an adverse action often depends on inferences rather than on direct evidence." (*McGrory v. Applied Signal Technology, Inc.* (2013) 212 Cal.App.4th 1510, 1529-1530.) However, "'a material triable controversy is not established unless the inference is reasonable.'" (*Id*. at p. 1530.) "'Circumstantial evidence of "'pretense' must be 'specific' and 'substantial' in order to create a triable issue

[9] In its summary judgment motion and on appeal, LACOFD has not challenged whether Berro met the other two elements of a prima facie case of employment discrimination – that he was performing his job competently and that "other circumstances" demonstrate a discriminatory motive – and thus we need not consider those elements.

with respect to whether the employer intended to discriminate" on an improper basis. [Citations.]'" (*Batarse v. Service Employees Internat. Union, Local 1000* (2012) 209 Cal.App.4th 820, 834.)

"[I]f nondiscriminatory, [the employer's] true reasons need not necessarily have been wise or correct." (*Guz, supra*, 24 Cal.4th at p. 358.) Thus, "[i]n responding to the employer's showing of a legitimate reason for the complained-of action, the plaintiff cannot '"simply show the employer's decision was wrong, mistaken, or unwise. Rather, the employee '"must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder *could* rationally find them 'unworthy of credence,' [citation], and hence infer 'that the employer did not act for the [. . . asserted] non-discriminatory reasons.' [Citations.]" [Citations.]' [Citation.]" [Citation.]' [Citation.]" (*McRae, supra*, 142 Cal.App.4th at pp. 388-389.)

"While the objective soundness of an employer's proffered reasons supports their credibility . . . , the ultimate issue is simply whether the employer acted with *a motive to discriminate illegally*. Thus, 'legitimate' reasons [citation] in this context are reasons that are *facially unrelated to prohibited bias*, and which, if true, would thus preclude a finding *of discrimination*." (*Guz, supra,* 24 Cal.4th at p. 358.) Further, "an inference of intentional discrimination cannot be drawn solely from evidence, if any, that the company lied about its reasons. The pertinent statutes do not prohibit lying, they prohibit discrimination. [Citation.] Proof that the employer's proffered reasons are unworthy of credence may 'considerably assist' a circumstantial case of discrimination, because it suggests the employer had cause to hide its true reasons. [Citation.] Still, there must be evidence supporting a rational inference that *intentional discrimination, on grounds prohibited by the statute, was the true cause* of the employer's actions. [Citation.]

Accordingly, the great weight of federal and California authority holds that an employer is entitled to summary judgment if, considering the employer's innocent explanation for its actions, the evidence as a whole is insufficient to permit a rational inference that the employer's actual motive was discriminatory." (*Id.* at pp. 360-361.)

1. *Notice of Instruction*

LACOFD proffered evidence that Berro was issued a notice of instruction for violating the LACOFD Physical Fitness Guidelines, which provide that "[s]tation personnel shall exercise each on-duty shift at 0815 hours. If interrupted by an emergency response, exercise period to begin immediately thereafter when practical. All other schedule variations to be approved by the battalion Chief. Personnel shall be ready for other activities by 0930 hours or within 15 minutes after completion of exercise period."

It is undisputed that on November 7, 2005, Berro's crew had not finished its mandatory workout by 9:30 a.m., at which time the period was interrupted by a mandatory Emergency Medical Technician drill. That drill did not constitute an "emergency response" under the Fitness Guidelines such as would justify the failure to complete the exercise period by 9:30 a.m. After the drill ended, at approximately 11:00 a.m., Berro directed his crew to resume their workout. Osby saw the crew engaged in the late workout, leading him to direct that Berro be issued a notice of instruction. Berro's violation of the Fitness Guidelines constitutes a legitimate, non-discriminatory reason for the issuance of the notice of instruction.

Seeking to raise a triable issue whether the explanation for the notice of instruction was pretextual, Berro disputed that the Physical Fitness Guidelines are strict policies, as opposed to mere guidelines that permit firefighters to exercise

after 9:30 a.m. where the circumstances require it.[10] He produced a significant amount of evidence that it was common for firefighters to finish their exercise workouts after 9:30 a.m., without facing discipline as a result.

However, Berro failed to demonstrate that he was "similarly situated" to the other firefighters who were not disciplined for late workouts. (*Iwekaogwu v. City of Los Angeles* (1999) 75 Cal.App.4th 803, 817 ["comparative evidence of pretext [is] evidence that [plaintiff] was treated differently from others who were similarly situated"].) None of these firefighters indicated that it was common for entire teams to conduct their exercise workout as late in the day as Berro's team was conducting theirs on the date in question, and, as Berro admits, Osby's unexpected presence at the late workout led by Berro contributed to the issuance of a notice of instruction in this instance.

Moreover, while evidence that other firefighters were not disciplined for late workouts might tend to show that issuance of a notice of instruction to Berro for a violation of the workout guidelines was unusually harsh, it fails to meet Berro's burden of raising a triable issue of pretext. To meet that burden, he was required to proffer evidence creating a reasonable inference that he was disciplined more harshly *because he is Caucasian*. Evidence that similarly-situated Hispanics were treated more leniently by his Hispanic supervisors could help raise such an

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10 The Physical Fitness Guidelines state that they are "designed to encourage an optimal level of fitness, improve the level of service provided to the public, and reduce those accidents or injuries caused by poor conditioning. These guidelines explain the conditions, responsibilities, and parameters of the program." According to the Policy Manual, interpretation of the rules and regulations is to be made by an immediate supervisor. "Supervisors are responsible for implementing and maintaining work schedules and for evaluating requests to change work schedules." LACOFD asserts that Berro admitted he violated LACOFD policies by directing his team to exercise at approximately 11:00 a.m. on the day in question, but the evidence to which it cites does not support the contention.

inference. (See *Vasquez v. County of Los Angeles* (9th Cir. 2003) 349 F.3d 634, 641 ["A showing that [an employer] treated similarly situated employees outside [an employee's] protected class more favorably would be probative of pretext."]) But Berro produced no such evidence. Although he produced evidence tending to show that other firefighters exercised after 9:30 a.m. with impunity, he did not produce evidence that these individuals were outside the alleged protected class, i.e., that they were Hispanic as opposed to Caucasian. Further, it cannot fairly be *assumed* that the other firefighters who were not disciplined were outside the protected class. The only evidence in the record of the ethnic breakdown at Fire Station 20 is anecdotal: firefighter Michael Headington estimated that approximately 99 percent of the firefighters were Caucasian, and one percent were Hispanic. Of course, evidence that other Caucasian firefighters were not disciplined for engaging in late workouts does not aid Berro's contention that his own notice of instruction was motivated by racial animus towards him because he is Caucasian. Indeed, another Caucasian firefighter, Captain Coulter, who allowed his crew to finish its workout at the same time and place as Berro, initially received a lesser punishment than Berro -- a verbal counseling and not a notice of instruction – thus suggesting that the harshness of Berro's punishment was not motivated by his race. Captain Coulter only later received a notice of instruction after Berro complained that they were being treated differently. Berro asserts that Gandara admitted to him that the notice of instruction "possibly" was given to him because he had questioned his superiors regarding the Holland transfer. Although this evidence may suggest that Gandara issued the notice of instruction because he resented Berro's role in the Holland matter, it does not raise a rational inference that Gandara issued it because Berro was Caucasian. In short, "[a] plaintiff in a racial discrimination action has the burden of proving . . . that the plaintiff's race was a substantial factor in the adverse employment decision." (*Horsford v. Board*

of Trustees of California State University (2005) 132 Cal.App.4th 359, 375.) Berro produced no such evidence with respect to the notice of instruction.

2. *Letter of Reprimand*

Montoya's April 22, 2006 letter of reprimand to Berro concerned performance evaluations submitted by Berro for the firefighters on his crew. LACOFD produced evidence showing that the letter was issued because, in violation of a recently revised LACOFD policy, Berro failed to provide sufficient documentation for the evaluations, even after being directly ordered to do so, and was insubordinate in dealing with his superiors' directions.

a. *Evidence of a Legitimate, Nondiscriminatory Reason*

The letter of reprimand recounts the following:[11]

"On January 30, 2006, Battalion Chief Gandara returned your personnel's 2006 performance evaluations for revision because the documentation you provided did not support the ratings that you gave to all five of your personnel (FFS 'Doe 1' – Outstanding, the remaining four firefighters – Very Good). You were verbally instructed to either supply additional information that supports the ratings that you gave or to provide the appropriate factor and overall ratings based on the current documentation. [¶] On February 4, 2006, you submitted revised performance evaluations with ratings that were still not supported by the accompanying documentation. You also submitted a memo dated February 2,

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[11] LACOFD included only the cover page of the April 22, 2006 letter of reprimand in its summary judgment papers. However, in his opposition papers, Berro included the entire letter, which lists the facts upon which the reprimand is based. "We may consider this evidence in deciding whether defendant's burden was met, even though it was submitted in plaintiff's opposition." (*Hutton, supra*, 213 Cal.App.4th at p. 497, fn. 10; see *Villa v. McFerren* (1995) 35 Cal.App.4th 733, 749–751.)

2006, that stated the reasons you could not change your ratings, including improper notification to you of the changes to the rating system.[12] Chief Gandara had advised all of his captains through a December 21, 2005 email and during his January 6, 2006 captains meeting (which you attended) of the type of documentation and performance criteria that he would be looking for. [¶] On February 16, 2006, Chief Gandara gave you a verbal direct order via telephone conversation and he followed up with a written direct order that ordered you to supply sufficient documentation that supports the factor and overall ratings that you gave to your personnel or to change the factor and overall ratings to the appropriate ratings. You were given until 8:00 p.m. on February 16, 2006, to complete this order. Chief Gandara also offered in writing to assist you with the revisions. [¶] Later that evening, upon receipt of the written direct order, you submitted revised performance evaluations that contained additional changes to some factor ratings and additional documentation that amounted to routine duties. The overall ratings had remained the same and were not supported by the accompanying documentation. [¶] On February 26, 2006, Chief Gandara met with you and reiterated the instructions from the direct order issued on February 16,

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12 LACOFD submitted the February 2, 2006 memorandum to Chief Gandara, in which Berro stated that he would not change his ratings for firefighters Headington, James Fernandez, and Leo Harris from "very good" to "competent," in part because he believed the fact that Station 20 was one of the busiest in the county set them apart from other firefighters. Berro also indicated his opinion that his existing comments in the performance evaluation were sufficient to justify the "very good" ratings he had given these firefighters. Berro further stated his belief that the rating system did not require "documenting every little detail." Although Berro stated that he understood "the need to change the Performance Evaluation process," he opined that "prior notification is required," and asked that management "give employees and supervisors the policies and procedures required of the new Performance Evaluation process prior to the evaluations being submitted," in order to "allow time for proper compiling of documentation and the satisfaction of upper management."

2006. You stated to Chief Gandara that you were not obligated to revise the performance evaluations based on advice from Local 1014 director and representative Don Lassig. [¶] On February 28, 2006, you discussed FFS 'Doe 1's' performance evaluation with Chief Gandara and agreed to provide the appropriate ratings in order to get FFS 'Doe 1's' performance evaluation approved and submitted to the captain's appraisal of promotability board. You also stated that you were refusing to revise any of the other performance evaluations in question. After reviewing FFS 'Doe 1's' fourth version of his performance evaluation, Chief Gandara advised you by telephone that the additional documentation did not support the factor ratings. [¶] On March 1, 2006, you submitted the fifth version of FFS 'Doe 1's' performance evaluation. The performance evaluation contained the appropriate factor and overall ratings (Very Good), but it also included a final summary that was essentially your subjective opinion, stating that you disagreed with Chief Gandara's and my interpretation of the rating system and that you only provided the appropriate ratings to assist FFS 'Doe 1's' AP process. Your summary clearly showed intent on your part to circumvent the instructions of the February 16, 2006 direct order. [¶] On March 2, 2006, you submitted FFS 'Doe 1's' sixth version of his performance evaluation with the appropriate factor, overall ratings, and containing no subjective opinions. The performance evaluation was approved and hand-delivered to the Personnel Section by Chief Gandara. [¶] On March 7, 2006, you and Local 1014 director and representative Don Lassig met with me to discuss a grievance. During the meeting, [Lassig] brought up the subject of the remainder of your personnel's performance evaluations. I gave you and [Lassig] clear direction as to the Department's rating criteria and degree of documentation that would be

appropriate for all ratings. You and [Lassig] agreed to provide the appropriate ratings for the remainder of the performance evaluations with Chief Gandara's assistance. [¶] On March 19, 2006, Chief Gandara met with you and delivered the remaining four unapproved performance evaluations. You stated to Chief Gandara that you would be revising the performance evaluations with [Lassig's] assistance, not Chief Gandara's assistance. [¶] Later that day, you emailed Chief Gandara that [Lassig] was unavailable until March 29, 2006, and that Local 1014 had advised you not to provide any further documentation regarding your personnel's performance evaluations until Lassig returns on March 29, 2006."

The letter stated that Berro was required to submit the remaining four performance evaluations, with the appropriate factor and overall ratings, within 10 business days, and noted that Gandara was available to assist him. It stated that any further violation of the Standards of Behavior "may be grounds for more serious disciplinary action."

LACOFD also proffered evidence of departmental policy providing that "[o]verall evaluation ratings other than competent shall be thoroughly supported by documentation in the comments section." Gandara, as the battalion chief and Berro's immediate supervisor, had the responsibility under the policy to ensure that sufficient documentation was presented for "very good" and "outstanding" performance ratings assigned by Berro. In 2005, Montoya reviewed the firefighter performance evaluations prepared by Berro and approximately 50 other captains. As the department head, Montoya believed his role was to ensure that the evaluations were filled out correctly and that the evaluations were accompanied by all appropriate documentation. Approximately 10 captains besides Berro had their evaluations returned for insufficient documentation. Montoya placed instructional notes on the deficient performance evaluations specifying where additional

documentation was necessary. In Berro's case, Gandara went over Montoya's comments with him.

The above evidence shows that Berro received the letter of reprimand because he violated two policy sections in LACOFD's Standards of Behavior by failing to perform all assigned duties and failing to carry out a lawful order by a superior. LACOFD thus satisfied its burden to show a legitimate, non-discriminatory reason for the reprimand.

b. *Evidence of Pretext*

To show that this explanation was pretextual, Berro stated in his declaration that the original performance evaluations he completed for his crew were adequate, and that there was no reasonable basis for Gandara and Montoya to require him to revise them numerous times. Lassig, in his declaration, stated that he reviewed the evaluations prepared by Berro and found them in compliance with department policies and procedures and "more than sufficient to support the ratings of his crew." Lassig stated that in his 18 years as a captain with LACOFD, all of his performance evaluations were accepted, even when he gave a crew member an "outstanding" or "very good" rating. In his 28 years in the fire service and 10 years with the union, he had never known a firefighter to be cited for insubordination for failure to provide paperwork or fill out paperwork in a timely manner.

Berro also proffered deposition testimony from several firefighters from his crew, including Harris, Fernandez, and Dolan, who stated that in past years they had received "very good" or "outstanding" ratings supported by less documentation than was submitted for their 2005 performance evaluations. Fernandez testified that his 2005 performance evaluation was one of the "thickest or most documented" performance evaluations he had received, and Dolan

testified that in the past seven years, when he received an "outstanding" review, two to four pages of supporting documentation had been submitted, compared to six pages of documentation for the 2005 evaluation.

To show that he was singled out because he was Caucasian, Berro relied on Gandara and Montoya's acceptance of performance evaluations completed by a Hispanic captain, Rich Gracia, who was assigned to the same shift at Station 20, who gave his firefighters "very good" overall ratings allegedly supported by less or the same documentation. One of Berro's crew, Harris, whose 2005 evaluation was downgraded from "very good" to "competent," compared his own evaluation completed by Berro to a 2005 evaluation done by Gracia, assigning a rating of "very good" to firefighter Steven Glover. Harris believed that his own evaluation was supported by more background information and detail than Glover's. In his declaration, Lassig stated that "[t]here is no doubt in my mind that the acceptance of Gracia's evaluations, and corresponding rejection of the evaluations of Captain Berro was racially motivated."

In his declaration, Berro also stated that Gandara waited until 8:30 p.m. on February 16, 2006 to deliver the written order requiring that Berro revise the evaluations and provide sufficient documentation by 8:00 p.m. that same day, rendering it impossible for Berro to comply with the order. Berro subsequently revised and added more documentation to the evaluations, but nevertheless received the letter of reprimand. Eventually he was forced to downgrade all the evaluations or face suspension and termination.

c. *Failure to Raise a Triable Issue*

For several reasons, Berro's showing is insufficient to raise a rational inference that Montoya and Gandara issued the letter of reprimand regarding the performance evaluations because Berro is Caucasian.

First, it is undisputed that in 2005 the policy regarding the documentation required for "very good" and "outstanding" reviews changed. Thus, evidence that Berro's performance evaluations under the former policy assigning such favorable evaluations had been accepted with less documentation does not reasonably tend to prove that Montoya's refusal to accept Berro's 2005 evaluations and the related disciplinary measures were contrary to the current policy or motivated by racial animus. The same is true of Lassig's opinion that Berro's 2005 evaluations were adequate. And Berro's own opinion that his original evaluations were satisfactory is clearly not sufficient to withstand summary judgment. (*Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, 816 ["an employee's subjective personal judgments of his or her competence alone do not raise a genuine issue of material fact"]; *Villiarimo v. Aloha Island Air, Inc.* (9th Cir. 2002) 281 F.3d 1054, 1061.)

Second, even assuming that Montoya and Gandara were wrong with respect to whether Berro's evaluations were sufficiently supported to pass muster under the new policy, their erroneous interpretations of the policy are not sufficient, without more, to demonstrate a triable issue that their discipline of Berro was motivated by intentional discrimination on the basis of race. (*McRae, supra*, 142 Cal.App.4th at pp. 388-389.) Berro does not dispute that the 2005 performance evaluations completed by at least 10 captains were returned as inadequate, some more than once. But he proffered no evidence of the racial background of these captains. In this context, evidence that the performance evaluations by one Hispanic captain – Gracia – were accepted based on similar or lesser documentation as that submitted by Berro does not raise a reasonable inference that Montoya and Gandara singled out Berro for discipline on the basis his race. "[T]he smaller the sample, the greater the likelihood that an observed pattern is attributable to factors other than discrimination." (*Hicks, supra,* 160 Cal.App.4th

at p. 1007 [fact that every White news broadcast anchor who left the station was replaced with a minority person did not constitute evidence that station's hiring decisions were racially-motivated; "[s]ince the number of affected employees was so small, we do not find the pattern to be significant."].) Indeed, even assuming that Montoya and Gandara required less from Gracia's evaluations, it is just as likely that the differential treatment was the result not of race, but of nondiscriminatory reasons as mundane as a dislike of Berro based on his challenges to authority. (See *Slatkin v. University of Redlands* (2001) 88 Cal.App.4th 1147, 1157 (*Slatkin*) ["A personal grudge can constitute a 'legitimate, nondiscriminatory reason' for an adverse employment decision."]; see also *Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1118 [in case where plaintiff's supervisor berated him loudly and aggressively showed "unwarranted hostility," "mere fact [supervisor] is a female and plaintiff a male does not give rise to the inference that her alleged aggressive conduct was motivated by a desire to discriminate on the basis of gender"].) Lassig's unsupported opinion that the disparity in treatment was based on Berro's race is entirely speculative and adds nothing to the equation.

Finally, evidence that Gandara delivered the written order to Berro after the stated deadline for compliance does not suggest a racial motive. No disciplinary action was taken against Berro for more than a month after that written order was given. Berro was given multiple opportunities to revise the performance evaluations in the interim. And nothing suggests that the delivery of the letter after expiration of the stated deadline was the result of racial animus. In short, Berro's evidence of pretext "manifestly lacks sufficient probative force to allow a finding of intentional [racial] discrimination." (*Guz*, *supra*, 24 Cal.4th at p. 354.)

3. *Temporary Transfer to Limited Duty Position*

LACOFD also presented a legitimate, non-discriminatory reason for Berro's temporary transfer to a limited duty fire prevention desk on October 22, 2008. On October 17, 2008, after a five-month leave, Berro's physician, Susan Zachariah, cleared him to return to work, with the restriction that he have no contact with Montoya, Gandara, and Osby, the chiefs with whom he had conflict. Based upon this "no contact" restriction, Kathaleen Wells, the Caucasian head of the return-to-work section of the LACOFD risk management division, made the decision to place Berro on a limited duty assignment, where compliance with the restriction could be ensured. Once Berro's physician released these restrictions on November 19, 2008, Wells released Berro to return to his full-duty job.

Berro presented evidence of a more complicated sequence of events, which he contends demonstrates that LACOFD manipulated his doctor into adding restrictions that then could be used to force him out of his regular full-duty job and humiliate him by placing him at a desk where he was given no work. Berro's evidence showed that Dr. Zachariah submitted an initial patient status report dated October 13, 2008, releasing Berro to his usual and customary position but stating that he should have no contact with Montoya, Gandara and Osby. An employee who worked under Wells in the return-to-work section, Donna Goldstein, contacted Dr. Zachariah and asked her to fill out another form (Dr. Zachariah had completed the form for physical illness, not stress-related illness). In a later telephone call, Goldstein told Dr. Zachariah that the report was not specific enough, and asked Dr. Zachariah to clarify whether Berro could be around the three chiefs in emergency situations, such as fires. Dr. Zachariah responded that he should not, and Goldstein instructed her to include the following more specific language in her report: "Even in emergency situations, Captain Berro must not be in close proximity or in contact with" Montoya, Gandara and Osby.

Based on this showing, Berro contends that LACOFD engineered the medical restriction and used it as a pretext to transfer him, and that persons other than Wells were behind the decision to transfer him. But Berro's showing does not permit a reasonable inference that the motive behind his temporary transfer was discriminatory animus against him as a Caucasian. The following is undisputed: (1) the restriction of no contact with Montoya, Gandara and Osby emanated from Dr. Zachariah; (2) in communicating the restriction, Dr. Zachariah completed the wrong patient status form, intended for cases of physical illness, not stress-related illnesses; (3) Goldstein faxed the proper patient status form, and followed up with a phone call in which she asked Dr. Zachariah to clarify whether Berro could be in contact with the three chiefs in an emergency situation; (4) Dr. Zachariah answered that he should not; (5) Goldstein had Dr. Zachariah add specific qualifying language to the medical restriction; and (6) based on the restriction as clarified, Berro was temporarily transferred to another station where he would not be in contact with Montoya, Gandara, and Osby.

Nothing in this undisputed sequence of events suggests that racial animus, as opposed to implementing the terms of Berro's medical restriction, motivated the temporary transfer. Berro also relies on evidence that Wells told him at a November 6, 2008 meeting that she did not know who directed or initiated the order to transfer him to a limited duty assignment, thus contradicting her subsequent assertion in her deposition that she was solely responsible for the decision to transfer him. However, the suggestion that someone other than Wells might have directed the transfer, even if that person was Montoya, Gandara or Osby (a proposition itself unsupported by any evidence), does not create a reasonable inference that the transfer was made because Berro is Caucasian rather than because of his medical restriction. Indeed, assuming that Wells was not truthful about who ordered the limited duty transfer, "an inference of intentional

discrimination cannot be drawn solely from evidence, if any, that the company lied about its reasons. The pertinent statutes do not prohibit lying, they prohibit discrimination." (*Guz, supra*, 24 Cal.4th at pp. 360-361.) Although evidence that an employer has been dishonest "may 'considerably assist' a circumstantial case of discrimination," our Supreme Court has made clear that there still "must be evidence supporting a rational inference that *intentional discrimination, on grounds prohibited by the statute, was the true cause* of the employer's actions." (*Id.* at p. 361; see *Slatkin, supra*, 88 Cal.App.4th at p. 1156.) Here, it cannot reasonably be inferred from the evidence that one or more LACOFD actors harboring racial animus against Berro made the decision to place him in a temporary limited-duty assignment to humiliate and punish him.

4. *Petition for TRO and Injunction Against Berro*

As to LACOFD's petition for a TRO and permanent injunction prohibiting violence or threats of violence by Berro against Montoya, Gandara, and Osby, the evidence produced by LACOFD showed that the petition was justified by the legitimate purpose of protecting the chiefs from potential violence by Berro.

In her deposition on December 4, 2008, Dr. Zachariah testified that some months earlier (other evidence showed it was in September 2008), Berro brought her a handwritten note which stated the following: "Severe anger towards LA CO FD Management. Afraid I may physically harm related chiefs. Feel like I am going to explode." Based on this evidence, LACOFD applied for a TRO in superior court on December 23, 2008, which was granted. The petition for a permanent injunction was later denied in January 2009.

Berro does not dispute that he wrote the note suggesting he might physically harm Montoya, Gandara, and Osby. He contends, however, that LACOFD could not have reasonably believed that he posed a threat, and that LACOFD pursued the

TRO and injunction as another method of discrimination against him because he is Caucasian.

However, there is no evidence to suggest a racial motivation behind the application for the TRO and injunction. To the contrary, the undisputed evidence shows that the motivation was the perceived threat to the chiefs and the need to ensure their protection. The superior court found the evidence of the note sufficient to issue the TRO, and although the petition for an injunction was ultimately denied, the denial does not suggest that the injunction was sought to discriminate against Berro on the basis of race.

5. *Conclusion*

"The ultimate burden of persuasion on the issue of actual discrimination remains with the plaintiff." (*Guz, supra*, 24 Cal.4th at p. 356.) Here, Berro has failed to establish a material factual dispute as to whether racial animus was behind any of LACOFD's actions. Accordingly, we affirm the adjudication of the cause of action for discrimination under FEHA.

II. *FEHA Retaliation Claim*

We turn now to Berro's retaliation claim under FEHA. FEHA prohibits an employer from retaliating against an employee for engaging in activity protected under FEHA, i.e., "oppos[ing] any practices forbidden under this part" or filing a complaint, testifying, or assisting in any proceeding "under this part." (§ 12940, subd. (h); see *Yanowitz, supra*, 36 Cal.4th at p. 1042.) "[I]n order to establish a prima facie case of retaliation under the FEHA, a plaintiff must show (1) he or she engaged in a 'protected activity,' (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer's action." (*Yanowitz, supra,* 36 Cal.4th at p. 1042; see

McCoy v. Pacific Maritime Assn. (2013) 216 Cal.App.4th 283, 298.) Like the trial court, we conclude that Berro failed to raise a triable issue of fact that he engaged in protected activity.

In the operative complaint, the only protected activity Berro alleged in his retaliation claim was his protest of the Holland transfer. Specifically, Berro alleged that he "engaged in a protected activity when he questioned the propriety of the actions taken in the Holland matter," and as a result he experienced retaliation and discriminatory treatment from his Hispanic supervisors Montoya and Gandara, which conduct was ratified by Osby and LACOFD. As we explain, Berro failed to produce evidence to show that his protest of the Holland transfer constituted protected activity.

By its terms, protected activity under the FEHA retaliation provision requires employee opposition to employer actions, practices, or policies, or to employee participation in proceedings, *that are in opposition to rights guaranteed by FEHA.* (*Rope v. Auto-Chlor System of Washington, Inc.* (2013) 220 Cal.App.4th 635, 653-654 (*Rope*) [employee's complaints about employer's failure to grant paid family leave did not constitute protected activity because such complaints did not concern conduct forbidden by FEHA].) Therefore, to the extent Berro complained to his employer that "Gandara violated the LACOFD's policy and procedures" by transferring Holland, such a charge does not constitute protected activity under FEHA.

However, Berro alleged that he not only believed that LACOFD violated internal department policy when it detailed Holland to the paramedic position, but that he also believed LACOFD took such action because Holland was Caucasian. "[A] retaliation claim may be brought by an employee who has complained of or opposed conduct that the employee reasonably believes to be discriminatory, even when a court later determines the conduct was not actually prohibited by the

FEHA." (*Yanowitz, supra,* 36 Cal.4th at p. 1043; see *Rope, supra,* 220 Cal.App.4th at p. 652 ["The protected activity element may be established by evidence that the plaintiff threatened to file a discrimination charge [citation], [or] by a showing that the plaintiff mistakenly, but reasonably and sincerely believed he was opposing discrimination [citation]."]

But here, the evidence shows that Berro never notified LACOFD that he believed the Holland transfer was racially-motivated. He instead characterized the transfer solely as a violation of LACOFD policy. As such, he cannot withstand summary adjudication on his FEHA retaliation claim. "Standing alone, an employee's unarticulated belief that an employer is engaging in discrimination will not suffice to establish protected conduct for the purposes of establishing a prima facie case of retaliation, where there is no evidence the employer knew that the employee's opposition was based upon a reasonable belief that the employer was engaging in discrimination. [Citation.] Although an employee need not formally file a charge in order to qualify as being engaged in protected opposing activity, such activity must oppose activity the employee reasonably believes constitutes unlawful discrimination, and complaints about personal grievances or vague or conclusory remarks that fail to put an employer on notice as to what conduct it should investigate will not suffice to establish protected conduct." (*Yanowitz, supra*, 36 Cal.4th at pp. 1046-1047, fn. omitted; see *Villanueva v. City of Colton* (2008) 160 Cal.App.4th 1188, 1199 [retaliation claim failed because there was no evidence plaintiff engaged in protected activity, where "the record is devoid of evidence that he ever complained to anyone about alleged racial discrimination or did anything to imply that racial discrimination was an issue"]); *Morgan, supra,* 88 Cal.App.4th at pp. 69, 74 [plaintiff must proffer evidence that his employer was aware that he engaged in the protected activity; employer could not have acted in retaliation against employee for filing a grievance alleging racial discrimination

without knowledge that the plaintiff had filed the grievance]; *Barber v. CSX Distribution Services* (3d Cir. 1995) 68 F.3d 694, 702 ["A general complaint of unfair treatment does not translate into a charge of illegal age discrimination" and thus does not constitute protected activity]; *Booker v. Brown & Williamson Tobacco Co., Inc.* (6th Cir. 1989) 879 F.2d 1304, 1313 [plaintiff's letter challenging correctness of a decision made by his employer and making a vague charge of discrimination was insufficient to constitute protected activity]; *Lewis v. City of Fresno* (E.D. Cal. 2011) 834 F.Supp.2d 990, 1002 [plaintiff's email to supervisor and informal grievance alleging disparate treatment and discrimination in scheduling overtime assignments were based on violations of department policy, not race, and thus did not constitute protected activities].)

Berro contends that he notified LACOFD in grievance documentation submitted on March 20, 2006, and then later in a February 20, 2007 memorandum to Fire Chief P. Michael Freeman, that he believed the decision to transfer Holland was race-based. The documents do not support that assertion.

In the March 20, 2006 memorandum to Montoya, entitled "Additional Grievance Information," Berro discussed the transfer of Holland to the paramedic position, stating that Gandara broke with department protocol by ordering the assignment. He also alleged that Gandara admitted that Berro's complaints with respect to the Holland incident were a factor in Gandara's decision to issue him a notice of instruction instead of a verbal admonishment when Berro led his team in a late workout. Berro cited this conduct as an "example of his personal harassment and discrimination towards me." The memorandum also stated, "As stated by the County Office of Affirmative Action and the State Department of Fair Employment and Housing, Chief Gandara's discrimination and harassment towards me falls under the headings of Discrimination/Harassment and Retaliation by Management or Peers." The Office of Affirmative Action reviewed Berro's

April 12, 2006 memorandum and concluded that it did not raise a "discriminatory protected basis in his grievance/complaint of differential treatment or harassment allegations," and did not allege a FEHA violation. We agree. Berro's claims of harassment and discrimination refer to Berro himself, not Holland, and do not suggest a belief that Holland's race was the basis for the decision to detail Holland to the paramedic position.

Similarly, in Berro's February 20, 2007 letter to Freeman, Berro referred to "the discrimination, harassment, incompetence and creation of a hostile work environment initiated by" Montoya and Gandara. He included a laundry list of asserted wrongful acts against him, and stated his "strong belief . . . that the retaliatory conduct initially arose out of my questioning whether certain conduct was in compliance with the policies and procedures of the LACOFD" in connection with the Holland transfer. But Berro did not identify Holland's race, and did not state that he believed Montoya and Gandara violated LACOFD policy by transferring Holland for a racially discriminatory motive. In short, he provided no information from which LACOFD might reasonably understand his protest against the Holland transfer was based on his belief that it was racially discriminatory against Holland. Rather, his complaint referred solely to a violation of LACOFD's policies and procedures, with no reference to race.

In sum, neither the March 20, 2006 grievance nor the February 20, 2007 letter sufficed to alert LACOFD that Berro was protesting a racially discriminatory staffing decision by his superiors. On appeal (as he did in opposing summary judgment in the trial court), Berro seeks to expand the scope of his protected activity in the FEHA retaliation claim to include his complaints regarding other allegedly race-based actions by his superiors, such as the rejection of his performance evaluations when a Hispanic captain had inferior evaluations accepted. However, Berro failed to allege in the operative complaint that

LACOFD retaliated against him because of his protests about these other allegedly race-based decisions. Instead, he specifically alleged that the retaliation claim was based on LACOFD's reaction to his complaints about the Holland incident. LACOFD's summary judgment motion properly addressed only the asserted protected activity of the Holland incident, because that was the issue framed by the pleadings. (*Conroy v. Regents of University of California* (2009) 45 Cal.4th 1244, 1254 [moving party's burden on summary judgment was to negate only those theories of liability alleged in the complaint]; *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1253 (*Laabs*) ["[A] 'defendant moving for summary judgment need address only the issues raised by the complaint; the plaintiff cannot bring up new, unpleaded issues in his or her opposing papers.' [Citation.]"].) "[C]laims against public entities [must] be specifically pleaded." (*Brenner v. City of El Cajon* (2003) 113 Cal.App.4th 434, 439; see *Susman v. City of Los Angeles* (1969) 269 Cal.App.2d 803, 809 [with respect to tort claims against a government entity, "[e]very fact essential to the existence of statutory liability must be pleaded"].)

If Berro wished to oppose summary judgment on the basis of other allegedly protected activity not alleged in his complaint, he should have sought leave to amend his complaint. (*Laabs, supra*, 163 Cal.App.4th at p. 1253 ["'If the opposing party's evidence would show some factual assertion, legal theory, defense or claim not yet pleaded, that party should seek leave to amend the pleadings before the hearing on the summary judgment motion. [Citations.] [Citation.]"].) He did not do so, and therefore his attempt to invoke other allegedly protected activity is forfeited.

III. *Hostile Work Environment Claim*

Berro's FEHA harassment claim fails because there is no triable issue that LACOFD engaged in harassing behavior within the meaning of FEHA. Section 12940, subdivision (j)(1) makes it unlawful "[f]or an employer . . . or any other person, because of race . . . to harass an employee." "[H]arassment consists of . . . conduct presumably engaged in for personal gratification, because of meanness or bigotry, or for other personal motives." (*Reno v. Baird* (1998) 18 Cal.4th 640, 645-646 (*Reno*).) Harassment "can take the form of 'discriminatory intimidation, ridicule, and insult' that is '"'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."'" [Citations.]" (*Rehmani v. Superior Court* (2012) 204 Cal.App.4th 945, 951.) Examples include slurs or derogatory comments on a basis enumerated in FEHA, derogatory drawings, cartoons or posters, physical interference with freedom of movement, or unwanted sexual advances. (*Reno, supra,* 18 Cal.4th at p. 646; Cal. Code Regs., tit. 2, § 7287.6, subd. (b)(1).)

Harassment thus "focuses on situations in which the *social environment* of the workplace becomes intolerable because the harassment (whether verbal, physical, or visual) communicates an offensive message to the harassed employee." (*Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 706 (*Roby*).) "Harassment is *not* conduct of a type necessary for management of the employer's business or performance of the supervisory employee's job." (*Reno, supra*, 18 Cal.4th at p. 646, italics added.) "'[C]ommonly necessary personnel management actions such as hiring and firing, job or project assignments, office or work station assignments, promotion or demotion, performance evaluations, the provision of support, the assignment or nonassignment of supervisory functions, deciding who will and who will not attend meetings, deciding who will be laid off, and the like, do not come within the meaning of harassment. . . .' [Citation.]" (*Id.* at pp. 646-

647; see *Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55, 64-65.) "These actions may retrospectively be found discriminatory if based on improper motives, but in that event the remedies provided by the FEHA are those for discrimination, not harassment." (*Reno, supra,* 18 Cal.4th at p. 647.) However, "some official employment actions done in furtherance of a supervisor's managerial role can also have a secondary effect of communicating a hostile message. This occurs when the actions establish a widespread pattern of bias." (*Roby, supra*, 47 Cal.4th at p. 709.) Thus, "acts of discrimination can provide evidentiary support for a harassment claim by establishing discriminatory animus on the part of the manager responsible for the discrimination, thereby permitting the inference that rude comments or behavior by that same manager was similarly motivated by discriminatory animus." (*Ibid*.)

Here, Berro proffered no evidence that his supervisors subjected him to verbal, physical, or visual harassment based on his Caucasian appearance. In support of his harassment claims, he relies on the same conduct underlying his discrimination claim, which consists of his superiors' personnel management actions: issuing him the notice of instruction for physical exercise outside the prescribed time period, rejecting performance evaluations he drafted for his team, moving Holland off his team, having his request for medical and station supplies denied, imposing excessive discipline on his crew members, delaying his application for the position of recruit trainer for two months, temporarily freezing his requested transfer to another fire station, temporarily transferring him to a fire prevention desk job, seeking a TRO and injunction against him, and issuing him a letter of reprimand for personal use of a department computer and email to solicit support from his coworkers for his lawsuit. Those personnel management actions are not the type of conduct that is actionable "harassment" under FEHA. (See *Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 870-871 [summary

judgment was appropriately granted on plaintiff's harassment claim where she only presented evidence of personnel decisions and failed to present evidence that supervisors made derogatory comments or engaged in any other conduct that constituted harassment].) Moreover, there is no substantial evidence in the record that any of these management decisions, or any other remarks or actions that may have been directed at Berro, were racially motivated. As such, even if the conduct could be deemed "harassing," it would not constitute harassment under FEHA. Thus, summary judgment was properly granted on his cause of action for harassment.

IV. *Negligent Investigation Claim*

Berro's FEHA negligent investigation claim also fails. Section 12940, subdivision (j)(1), provides in part that "[a]n entity shall take all reasonable steps to prevent harassment from occurring," and subdivision (k) states that "[i]t is an unlawful employment practice . . . [f]or an employer . . . to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring." The trial court found that Berro's negligent investigation claim failed as a matter of law because it was premised on LACOFD's violations of its internal rules and regulations, which did not confer a mandatory duty on LACOFD. However, we conclude that this claim for failure to investigate discrimination and harassment was properly adjudicated in favor of LACOFD for the more fundamental reason that no such cause of action may be maintained "unless actionable misconduct occurred." (*Thompson v. City of Monrovia* (2010) 186 Cal.App.4th 860, 880; see *Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 289 ["Employers should not be held liable to employees for failure to take necessary steps to prevent such conduct, except where the actions took place and were not prevented."]; *Kohler v. Inter–Tel Technologies* (9th Cir.

2001) 244 F.3d. 1167, 1174, fn. 4 [requirement that an employer take reasonable steps to prevent harassment "is only a basis for liability if the plaintiff proves that actual discrimination or harassment occurred."].) Here, Berro failed to raise a triable issue on his discrimination and harassment claims, and thus it follows that the trial court correctly granted summary judgment on his second cause of action for negligent investigation of discrimination and harassment.[13]

V. *Whistleblower Retaliation Claims*

Berro contends that the trial court erred in granting summary judgment on his fifth cause of action for whistleblower retaliation in violation of Labor Code section 1102.5, Los Angeles County Code section 5.02.060, and section 53298. He is incorrect.

1. *Labor Code Section 1102.5*

During the time period relevant to this case, Labor Code section 1102.5, subdivision (b) provided: "An employer may not retaliate against an employee for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal

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[13] Although the trial court granted summary adjudication on a different ground, supplemental briefing is not required under Code of Civil Procedure section 437c, subdivision (m)(2) because the ground on which we rely was raised below and already has been briefed on appeal. (*Byars, supra,* 109 Cal.App.4th at p. 1147, fn. 7.) Because we find that the claim for negligent investigation fails along with the causes of action for discrimination and harassment, we need not address LACOFD's alternative contentions that the claim failed because (1) it lacked the statutory basis necessary for a negligence action against a public entity; (2) the internal rules and regulations LACOFD was alleged to have violated conferred no mandatory duty on LACOFD; (3) no evidence was presented that LACOFD violated any rule or regulation; and (4) Montoya, Gandara and Osby were immune from liability and thus LACOFD could not be held liable.

rule or regulation."[14] The purpose of this statute is to "encourag[e] workplace whistle-blowers to report unlawful acts without fearing retaliation." (*Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 77.) Berro contends that has a valid cause of action under this provision because he reported to LACOFD, his government agency employer, that his superiors engaged in racial discrimination by transferring Holland and that he experienced retaliation as a result.[15]

Citing *Mueller v. County of Los Angeles* (2009) 176 Cal.App.4th 809 (*Mueller*), the trial court granted summary judgment in favor of LACOFD on the claim, finding that Berro's complaints to his employer about the Holland transfer did not allege a violation of a federal or state statute, rule, or regulation, as required by Labor Code section 1102.5, and instead concerned routine internal personnel matters that are not encompassed by that provision. On appeal, Berro argues that *Mueller* is distinguishable, because unlike the *Mueller* plaintiff, he reported violations of state law, namely FEHA.

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[14] Effective January 1, 2014, Labor Code section 1102.5, subdivision (b) also prohibits retaliation against whistleblower employees who disclose a violation of a local rule or regulation, in addition to a state or federal rule or regulation.

[15] On appeal, Berro suggests that he also "blew the whistle" by alleging that Gandara fraudulently obtained his EMT certification, that Freeman allowed another employee to work from home for four years, that Assistant Fire Chief Tommy Massey was drinking on duty, and that Massey may have helped members of the Black Firefighter Association cheat on a battalion chief test. He also contends that he reported his discriminatory and harassing transfer to a desk job. However, his complaint does not allege any of these facts, much less allege that he reported them to his employer, and thus these allegations properly were not addressed in LACOFD's summary judgment motion. Berro also contends on appeal that he reported to his superiors the late workout incident and "performance evaluation retaliation," but in opposing LACOFD's summary judgment motion, he did not rely on these events as the basis for his claim under Labor Code section 1102.5, and instead relied exclusively on his reporting of the Holland incident. Accordingly, he has forfeited his arguments based on those other alleged whistle-blowing activities.

In *Mueller*, the plaintiff, a firefighter with the Los Angeles County Fire Department, sued his employer for whistleblower retaliation under Labor Code section 1102.5, among other claims. He alleged in his complaint that he had "publicly stated his disapproval that two firefighters in the department . . . had been transferred, and thereafter their temporary replacements . . . retaliated against plaintiff for his having expressed his opinion [and] engaged in a continuing and systematic pattern of harassing plaintiff." (*Mueller, supra*, 176 Cal.App.4th at p. 812.) The trial court found, and the appellate court agreed, that the plaintiff failed to point to evidence that the plaintiff reported a violation of a state or federal law or regulation with respect to the transfer of the firefighters. (*Mueller, supra*, 176 Cal.App.4th at pp. 821-822; see also *Edgerly v. City of Oakland* (2012) 211 Cal.App.4th 1191, 1199 [protected activity for purposes of Lab. Code, § 1102.5 "is the disclosure of or opposition to 'a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation.' [Citation.]"]; *Mokler v. County of Orange* (2007) 157 Cal.App.4th 121, 138.) The *Mueller* court noted that "[m]atters such as transferring employees, writing up employees, and counseling employees are personnel matters. 'To exalt these exclusively internal personnel disclosures with whistleblower status would create all sorts of mischief. Most damagingly, it would thrust the judiciary into micromanaging employment practices and create a legion of undeserving protected 'whistleblowers' arising from the routine workings and communications of the job site. [Citation.]' [Citation.]" (*Mueller, supra*, 176 Cal.App.4th at p. 822.)

As discussed above in section II, Berro has not proffered evidence that he reported a reasonable suspicion that Holland's transfer was racially-motivated; rather, he complained only that the transfer was contrary to department protocol.

As such, he did not report a potential FEHA violation. Therefore, like the plaintiff's complaints in *Mueller,* Berro's complaint about Holland's transfer did not constitute protected activity for purposes of Labor Code section 1102.5. Thus, that provision does not support his whistleblower retaliation claim.[16]

2. *Los Angeles County Code section 5.02.060*

The whistleblower retaliation claim also is not supported by Los Angeles County Code section 5.02.060, subdivision A, which in relevant part prohibits employees of Los Angeles County from retaliating against an individual who reports "a work-related violation by a county officer or employee of any law or regulation" or a "gross abuse of authority." As discussed above, Berro did not complain of any violation of a law or regulation with respect to the decision to transfer Holland. Moreover, there is no private right of action under this local code provision. (*Mueller, supra*, 176 Cal.4th at p. 820; L.A. County Code, § 5.02.060, subds. C and D.)

3. *Section 53298*

Berro's whistleblower claim under section 53298, for retaliation against a public employee for disclosing an abuse of authority and gross mismanagement, is also fatally flawed. The elements of a claim under section 53298 include the following: (1) the employee filed a complaint with a local agency regarding gross mismanagement, a significant waste of funds, an abuse of authority, or a specific and substantial danger to public health or safety; (2) the complaint was filed within

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[16] In light of our holding that the trial court properly granted summary judgment on this claim under Labor Code section 1102.5 because he failed to proffer evidence that he engaged in protected activity for purposes of the statute, we need not consider LACOFD's argument that individual supervisors may not be held liable under the statute.

60 days of the date of the act or event that is the subject of the complaint; (3) the complaint was filed under penalty of perjury; (4) the complaint was filed in accordance with the locally adopted administrative procedure, or in the alternative there was no administrative procedure available; (5) the employee made a good faith effort to exhaust all available administrative remedies before filing the complaint; and (6) a local agency officer, manager, or supervisor took a reprisal action against the employee for filing the complaint. (*Neveu v. City of Fresno* (E.D. Cal. 2005) 392 F.Supp.2d 1159; §§ 53297, subds. (a)-(d), 53296, subds. (c)-(d), 53298, subd. (a).)

Berro failed to allege in his operative complaint that he met the particular requirements of section 53928 (e.g., that he filed an administrative complaint under penalty of perjury), and produced no such evidence in opposition to summary judgment. As such, the trial court properly adjudicated his claim under section 53928.

VI. *Intentional Infliction of Emotional Distress*

Berro contends that the trial court erred in concluding that his claim for intentional infliction of emotional distress was barred by the worker's compensation exclusivity rule. We disagree.

"An employer's intentional misconduct in connection with actions that are a normal part of the employment relationship, such as demotions and criticism of work practices, resulting in emotional injury is considered to be encompassed within the compensation bargain, even if the misconduct could be characterized as 'manifestly unfair, outrageous, harassment, or intended to cause emotional disturbance.' [Citation.] Workers' compensation ordinarily provides the exclusive remedy for such an injury. [Citations.] Conduct in which an employer steps out of its '"proper role"' as an employer or conduct of '"questionable relationship to the

employment,"' however, . . . is not encompassed within the compensation bargain and is not subject to the exclusivity rule." (*Singh v. Southland Stone, U.S.A., Inc.* (2010) 186 Cal.App.4th 338, 367; see *Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 Cal.3d 148, 161 (*Cole*); *Angelotti v. The Walt Disney Co.* (2011) 192 Cal.App.4th 1394, 1403; *Miklosy v. Regents of University of California* (2008) 44 Cal.4th 876, 902; Lab. Code, §§ 3600, 3601.) Thus, where an employer has engaged in discriminatory practices in violation of FEHA, an employee's cause of action for infliction of emotional distress is *not* barred by the exclusivity provisions of workers' compensation laws (*Accardi v. Superior Court* (1993) 17 Cal.App.4th 341, 352), because such a claim is "'founded upon actions that are outside the normal part of the employment environment . . . .' [Citation.]" (*Murray v. Oceanside Unified School Dist.* (2000) 79 Cal.App.4th 1338, 1363 ["where a plaintiff can allege that she suffered emotional distress because of a pattern of continuing violations that were discriminatory, her cause of action for infliction of emotional distress will not be barred by the exclusivity provisions of workers' compensation laws"]; see *Fretland v. County of Humboldt* (1999) 69 Cal.App.4th 1478, 1492 ["emotional distress claims are not barred by the exclusivity rule to the extent they seek emotional distress damages for the alleged work-related injury discrimination"].)

As we have discussed, Berro failed to raise a triable issue that his superiors engaged in discriminatory or harassing behavior based on his race. Rather, at best, the record suggests that he might have been treated harshly, conduct considered to fall within the normal employment relationship. Therefore, his cause of action for intentional infliction of emotional distress is barred. (See *Cole*, *supra,* 43 Cal.3d at p. 160 [when the misconduct attributed to the employer stems from "demotions, promotions, criticism of work practices, and frictions in negotiations as to grievances," the Labor Code worker's compensation provisions provide the

exclusive remedy for emotional disturbances resulting in disability]; *Shoemaker v. Myers* (1990) 52 Cal.3d 1, 15 [discipline and criticism, even intentional, unfair, or outrageous, are covered by the workers' compensation exclusivity provisions].)

We therefore affirm the judgment in LACOFD's favor.

VII. *LACOFD's Appeal on Attorney Fees, Expert Witness Fees, Sanctions, and Costs*

In a consolidated appeal, LACOFD asserts that the trial court erred in denying its motions under section 12965 for attorney fees in the amount of $418,372.33 and expert witness fees in the amount of $26,862.50, denying its motion for sanctions in the amount of $209,186.17 under Code of Civil Procedure section 1038, and taxing its costs. We disagree.

A. *Attorney Fees and Expert Witness Fees*

LACOFD asserts that the trial court abused its discretion in denying the motions for attorney and expert witness fees under section 12965. In any action brought under FEHA, section 12965 accords the trial court discretion to award the prevailing party "reasonable attorney's fees and costs, including expert witness fees." (§ 12965, subd. (b); Code Civ. Proc., §§ 1021, 1033.5, subd. (a)(10)(B); *Anthony v. City of Los Angeles* (2008) 166 Cal.App.4th 1011, 1017 (*Anthony*).) While a prevailing plaintiff in a FEHA action often is awarded fees, such awards are not routinely granted when it is the defendant that prevails. (*Cummings v. Benco Building Services* (1992) 11 Cal.App.4th 1383, 1387.) That the plaintiff merely failed to achieve success on his or her claim "should not automatically entitle a prevailing defendant to fees and costs or otherwise only those plaintiffs with the most airtight cases will risk bringing suit to enforce antidiscrimination legislation." (*Id.* at p. 1390.) Rather, a prevailing defendant in a FEHA case

should only be awarded fees "'"'where the action brought is found to be unreasonable, frivolous, meritless or vexatious.'"'" (*Id.* at p. 1387.) We review for an abuse of discretion the trial court's decision to deny LACOFD its reasonable attorney fees and expert witness fees. (*Id.* at p. 1387; *Chavez, supra,* 47 Cal.4th at p. 989.)

LACOFD has failed to show that the trial court committed a "manifest miscarriage of justice" in determining that Berro's action was not unreasonable, frivolous, meritless, or vexatious. (*Dolan v. Buena Engineers, Inc.* (1994) 24 Cal.App.4th 1500, 1504.) LACOFD argues that Berro's counsel knew that the claims were frivolous because in *Mueller v. County of Los Angeles* that same attorney represented another LACOFD firefighter in making similar claims against LACOFD, which claims were rejected in August 2009 in a published opinion by our colleagues in Division Three. (*Mueller, supra,* 176 Cal.App.4th 809.) However, Berro filed his opposition to the summary judgment motion on July 6, 2009, before the *Mueller* decision was published. And although the summary judgment motion was not argued until after *Mueller* was published, it was not frivolous for Berro's counsel to argue at the hearing that *Mueller* was wrongly decided, and to attempt to distinguish that case on the ground that no FEHA claims were alleged therein.

In addition, although LACOFD contends that the numerous successful demurrers it brought demonstrate that Berro's claims were meritless, the trial court noted in its ruling denying the motions for attorney and expert fees that it initially was inclined to deny summary adjudication as to some of the causes of action. We thus affirm the trial court's denial of the motions for attorney fees and expert witness fees.

B. *"Defense Costs" under Code of Civil Procedure section 1038*

LACOFD challenges the trial court's denial of its motion for defense costs under Code of Civil Procedure section 1038. The court denied the motion on the ground that it was not timely filed.

Code of Civil Procedure section 1038, subdivision (a), provides, in relevant part: "In any civil proceeding under the Government Claims Act . . . , the court, upon motion of the defendant . . . , shall . . . determine whether or not the plaintiff . . . brought the proceeding with reasonable cause and in the good faith belief that there was a justifiable controversy under the facts and law which warranted the filing of the complaint. . . . If the court should determine that the proceeding was not brought in good faith and with reasonable cause, an additional issue shall be decided as to the defense costs reasonably and necessarily incurred by the party or parties opposing the proceeding, and the court shall render judgment in favor of that party in the amount of all reasonable and necessary defense costs, in addition to those costs normally awarded to the prevailing party." "Section 1038 'provides public entities (which, since 1983, have been constitutionally proscribed from filing malicious prosecution actions) . . . with a way to recover the costs of defending against unmeritorious and frivolous litigation.' [Citation.]" (*Suarez v. City of Corona* (2014) 229 Cal.App.4th 325, 332; see *Kobzoff v. Los Angeles County Harbor/UCLA Medical Center* (1998) 19 Cal.4th 851, 857.)

A motion for defense costs under this provision must be made prior to the discharge of the jury or entry of judgment. (Code Civ. Proc., § 1038, subd. (c) ["This section shall be applicable only on motion made prior to the discharge of the jury or entry of judgment."]; see *Laabs, supra*, 163 Cal.App.4th at pp. 1270-1271.) In denying LACOFD's motion as untimely, the trial court noted that LACOFD did not file its motion until April 12, 2010, two months after judgment was entered on February 9, 2010. In its opening brief on appeal, LACOFD entirely

fails to address the trial court's ruling that its motion was untimely. Although LACOFD addresses the issue in its reply brief, arguing that the trial court had discretion to consider the motion even if it was filed late, we need not consider arguments raised for the first time in an appellant's reply brief. (*SCI California Funeral Services, Inc. v. Five Bridges Foundation* (2012) 203 Cal.App.4th 549, 573, fn. 18 (*SCI Calif. Funeral Services*) ["appellant cannot salvage a forfeited argument by belatedly addressing the argument in its reply brief"].) Thus, we deem LACOFD to have forfeited the issue, and we affirm the trial court's decision denying the motion for defense costs as untimely.

C. *Costs*

LACOFD contends that the trial court erred in disallowing its claimed costs for service of process fees ($1,206), transcripts ($2,236.75), expert deposition fees ($8,819.16), and mediation fees ($1,750).[17]

The right to recover litigation costs is determined entirely by statute. (*Davis v. KGO-T.V., Inc.* (1998) 17 Cal.4th 436, 439 (*Davis*).) Except for expert witness costs, the allowable litigation costs for a successful FEHA plaintiff are set forth in Code of Civil Procedure section 1033.5. (*Anthony, supra,* 166 Cal.App.4th at p.

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[17] In the introduction section of its opening appellate brief, LACOFD also cursorily contends in two sentences that the trial court abused its discretion by failing to timely enter judgment for costs to LACOFD within 15 days after notice of entry of judgment, and by granting Berro's ex parte motion for leave to file a late motion to tax costs. However, LACOFD did not make any reference to these contentions in the argument section of his brief. It has thus forfeited the arguments. (*Browne v. County of Tehama* (2013) 213 Cal.App.4th 704, 726 [appellant forfeited issue on appeal by failing to present it in the argument section of his brief]; Cal. Rules of Court, rule 8.204 (a)(1)(B) [appellate brief must "[s]tate each point under a separate heading or subheading summarizing the point, and support each point by argument and, if possible, by citation of authority"].) LACOFD's belated reference to these points in its reply brief does not save the argument from forfeiture. (*SCI Calif. Funeral Services, supra,* 203 Cal.App.4th at p. 573, fn. 18.)

1014.) Section 1033.5 also specifies certain unallowable costs, and otherwise gives the trial court discretion to allow or grant any cost items that are not specifically enumerated in that section. (Code Civ. Proc., § 1033.5, subds. (a), (b), (c)(4); see *Davis, supra,* 17 Cal.4th at p. 445.)

Allowable costs must be reasonably necessary to the conduct of the litigation and reasonable in amount (Code Civ. Proc., § 1033.5, subd. (c)(2), (3)), and thus a prevailing party is not always entitled to 100 percent of its costs. (*Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 130 (*Nelson*).) "'If the items [in a memorandum of costs] appear to be proper charges[,] the verified memorandum is prima facie evidence that the costs . . . therein listed were necessarily incurred . . . , and the burden of showing that an item is not properly chargeable or is unreasonable is upon the [objecting party].' [Citations.]" (*Id.* at p. 131.) But if a party objects to costs whose "'necessity . . . appears doubtful, or which do[ ] not appear to be proper on [their] face,'" then "'they are put in issue and the burden of proof is on the party claiming them as costs.'" (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 856.)

We review an award of costs for an abuse of discretion, including the trial court's resolution of the question of fact "[w]hether a cost is 'reasonably necessary to the conduct of the litigation.'" (*Gibson v. Bobroff* (1996) 49 Cal.App.4th 1202, 1209 (*Gibson*).)

1. *Service of Process Fees* (*$1,206*)

LACOFD challenges the trial court's decision granting Berro's motion to strike $700 of the $1,206 in costs for service of process fees included in LACOFD's memorandum of costs. Costs for service of process are expressly authorized by Code of Civil Procedure section 1033.5, subdivision (a)(4). The trial court did not specify its reasons for taxing the service of process costs, but it was

not required to, and we presume that its decision was sound unless an error is affirmatively shown. (*Moreno v. City of King* (2005) 127 Cal.App.4th 17, 30; *Thon v. Thompson* (1994) 29 Cal.App.4th 1546, 1548-1549.)

Berro argued that the service of process costs were unnecessary because they were all for service of subpoenas on Berro's treating physicians, retained experts, and Berro's wife, all of whom were represented by Berro's counsel, and who could have been made available for depositions if requested. In response, LACOFD stated that these witnesses were subpoenaed for depositions as there was no agreement by Berro's counsel to accept service on their behalf for a deposition notice. However, LACOFD offers no evidence that it ever asked Berro's counsel to accept such service. In light of these facts, we conclude that the trial court did not abuse its discretion in concluding that the service of process fees were not reasonably necessary.

2. *Transcripts*

The court struck $2,236.75 in costs for hearing transcripts, ruling that "[t]he transcripts were not ordered by the Court." Costs for transcripts of court proceedings are allowable only when "ordered by the court." (Code Civ. Proc., § 1033.5, subd. (a)(9).) In its opposition to Berro's motion to strike, LACOFD did not contend or present evidence that the court had ordered the parties to obtain transcripts; rather, it argued that the trial court had "recommended" that they do so, on multiple occasions. Accordingly, the court did not abuse its discretion in striking transcript costs.

3. *Expert Deposition Fees*

LACOFD contends the trial erred in striking its costs for payments totaling $8,819.16 to Berro's expert witnesses for their time at depositions taken by

LACOFD. However, it is well-established that fees paid by a prevailing party to compensate the other party's experts for their time while being deposed are not recoverable costs, in the absence of specific statutory authority. (Code Civ. Proc., § 1033.5, subd. (b)(1); *Gorman v. Tassajara Development Corp.* (2009) 178 Cal.App.4th 44, 74; *Baker-Hoey v. Lockheed Martin Corp.* (2003) 111 Cal.App.4th 592, 601; *McGarity v. Department of Transportation* (1992) 8 Cal.App.4th 677, 685-686.) Although such expert costs may be recoverable under section 12965, subdivision (b) where the underlying FEHA action was unreasonable, frivolous, meritless, or vexatious, as we have determined above in section VII.A, LACOFD failed to make such a showing. Therefore, the court correctly struck these costs.

4. *Mediation Fees*

The trial court indicated in its order on the motion to strike costs that it "decline[d] to exercise its discretion to award mediation costs" in the amount of $1,750. LACOFD contends that the trial court abused its discretion in so deciding.

"An award of costs for mediation expenses is not statutorily proscribed." (*Gibson, supra*, 49 Cal.App.4th at p. 1207.) In *Gibson,* the appellate court held that a trial court has discretion to award such costs where the mediation is court-ordered. (*Ibid.*) The appellate court expressly noted that it had no cause to decide whether a party may recover costs for a voluntary as opposed to a court-ordered mediation. (*Id.* at p. 1209, fn. 7.)

LACOFD made a generalized argument that mediation is "a well-accepted means of resolving (or attempting to resolve) disputes short of trial," and that "[a] determination that the cost of an outside mediator was not 'reasonably necessary' might inappropriately dissuade parties from choosing this very effective method that assists in conserving judicial resources." However, LACOFD failed to specify any reason that the mediation was reasonably necessary in this case. "Whether a

cost is 'reasonably necessary to the conduct of the litigation' is a question of fact for the trial court, whose decision will be reviewed for abuse of discretion." (*Gibson, supra*, 49 Cal.App.4th at p. 1209.) LACOFD has provided no basis for us to conclude that the trial court, which was in the best position to observe the litigation, abused its discretion in making that factual determination.

We affirm the trial court's rulings on the motion to tax costs.

DISPOSITION

The judgment is affirmed. The parties shall bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.